NO. 83-69

In the Supreme Court of the United States

OCTOBER TERM, 1983

THE UPJOHN COMPANY,

Petitioner,

vs.

O. L. MAULDIN,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT, O. L. MAULDIN, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioner, Upjohn, presents the question as follows:

> "Did allowing a lay jury to find that two prescription drugs manufactured by defendant medically caused plaintiff's disease in the total absence of expert testimony to that effect, violate the defendant's constitutional right to a trial by a jury capable and willing to decide the case solely on the evidence before it?"

The question is not properly presented as there was expert medical testimony and evidence to show that Upjohn's drugs caused the plaintiff's disease. The question more properly presented is:

> "Was the jury and Court of Appeals correct in finding that there was sufficient evidence that Upjohn's drugs caused Mauldin's condition?"

LIST OF INTERESTED PARTIES

O. L. MAULDIN

CHESTER FRANCIPANE

RICHARD T. REGAN

PHILIPPI P. ST. PEE

LEOPOLD BABIN

PAUL WIMBISH

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STATEMENT OF THE CASE

Respondent, O. L. Mauldin, injured the tip of his thumb on March 31, 1974, and in treatment therefor received two antibiotic drugs, namely, Lincocin and Cleocin, both manufactured by Upjohn. His doctor reported that he was expected to return to work in three weeks. However, shortly thereafter Mauldin began to experience episodes of diarrhea. Within three weeks his diarrhea had become

uncontrollable; he began to lose weight and began to experience severe stomach cramps. He returned to his doctor's office and Lomotil was prescribed for the diarrhea problem. At the time, Lomotil was considered by petitioner, Upjohn, to be *contraindicated* in the treatment of Cleocin induced diarrhea. However, this precaution was not included in the Upjohn literature and package insert. Furthermore, the package insert failed to disclose known methods of treatment.

Mauldin's symptoms progressed rapidly. He was hospitalized on May 15, 1974, with severe diarrhea, nausea, 8 to 10 bowel movements per day, fever up to 103 degrees, and a weight loss of 20 lbs. (R.T. Exhibit 2). A proctoscope performed prior to his admission to the hospital revealed the beginning processes of pseudomembranous colitis characterized by ulcer-type lesion.

Prior to this time, Mauldin was in an excellent state of health. His past history was totally non-contributory. Up to this point in time, Mauldin had received two, and only two, antibiotics, namely, Cleocin and Lincocin.

Prior to the time that Mauldin received the prescription for Lincocin and Cleocin from his treating physician, the Upjohn Company knew that such drugs would cause psuedomembranous colitis, yet failed to include such warning in their package literature or disseminate such information to the practicing physicians in this country. Evidence within the Upjohn file, though not disseminated, revealed that prior to Mauldin's accident, Upjohn had conducted a series of studies which conclusively proved that "biopsy proven pseudomembranous colitis" developed in 7.8% of the patients who had taken Cleocin. (R.T. Exhibit 3). Furthermore, the same studies indicated that the percentage

of Cleocin induced pseudomembranous colitis would be considerably higher if the condition was not immediately diagnosed and properly treated.

During the course of the trial, Upjohn defended on the basis that their warnings and package insert were, indeed, sufficient to warn that pseudomembranous colitis was a side effect from the use of their drugs. They further defended that Mauldin did not have pseudomembraneous colitis.

Additionally, prior to Mauldin's injury, Upjohn had learned that a certain special course of treatment was beneficial and necessary for the "detection and management" of those persons developing the signs of pseudomembranous colitis following use of Upjohn's drugs. (R.T. Exhibit 22). Such information was purposely withheld from dissemination by Upjohn's drug detail men, and was also eliminated from the appropriate package insert.

During the course of the trial, defendant's medical expert, Dr. V. Tedeso, as well as plaintiff's expert, Dr. G. McHardy, described with particularity the onset of the signs, symptoms and conditions of one who developed Cleocin induced pseudomembranous colitis. These signs, symptoms and conditions were established to be identical to that of Mauldin. The time at which Mauldin's symptoms began and progressed were completely consistent with, and identical to the progression of the disease as caused by Upjohn's drugs. Furthermore, it was established that at the time Mauldin's early signs of pseudomembranous colitis began to develop, he had received only Upjohn's drugs.

Upjohn sought to show that Mauldin's condition was

caused by another antibiotic drug, namely Keflex. This contention was specifically refuted by the expert testimony.

The record establishes by both direct and circumstantial evidence that Mauldin's condition was caused by the defendant's drugs and its failure to act as a reasonably prudent drug manufacturer in providing sufficient warning for *known* and *admitted* adverse reactions to the use of its drug. (R.T. Vol. 2, p. 262).

The jury, and the reviewing Appellate Court concluded that the evidence was sufficient to establish that Upjohn's drugs caused Mauldin's condition.

Petitioner seeks this Writ of Certiorari merely to review the sufficiency of such evidence.

SUMMARY OF ARGUMENT

The record, in this Louisiana diversity case, contains a sufficient evidentary basis for the jury to conclude that Upjohn's drugs caused Mauldin's condition. Proof of causation may be made by direct or circumstantial evidence, as well as those reasonable inferences which may be drawn from such facts. "The matter does not turn on the use of a particular form of words by the physicians in giving their testimony." *Sentilles v. Inter-Carribbean Shipping Corp.*, 361 U.S. 107, 109, 110, 80 S.Ct. 173 (1959); *Sartor v. Arkansas Natural Gas Corp.*, 321 U.S. 620, 64 S.Ct. 724 (1944); *Dick v. New York Life Insurance Co.*, 359 U.S. 437, 79 S.Ct. 921 (1951); *Picou v. American Offshore Fleet Inc.*, 576 F.2d 585 (5th Cir. 1978); *Porter v. American Optical Corp.*, 641 F.2d 1128 (5th Cir. 1981); *Weber v. Fidelity and Casualty Ins. Co. of New York*, 250 So.2d 754 (La. 1971).

Only where there is a complete absence of probative *facts* to support a conclusion reached does reversible error appear. *Lavender v. Kurn*, 327 U.S. 645, 653, 66 S.Ct. 740, 744, 90 L.Ed. 916 (1946).

ARGUMENT

Upjohn's assertion that there was a "total absence" of expert testimony sufficient to support the jury verdict is simply erroneous. Such assertion completely ignores the record. Although this Court has stated on many occasions that it is not its function to review a record to determine a conflict in facts and reweigh the evidence, nevertheless, this is precisely the issue presented in this petition. Respondent will, therefore, attempt to briefly present its opposition to the requested writ.

At the outset, respondent refers the attention of the Court to an obvious admission by Upjohn that the record contains evidence to the effect that its drugs were the cause of Mauldin's condition. At Page 4 of Upjohn's brief it is stated:

> "In summary, the experts testified that a disease like Mauldin's may result from a number of causes, known and unknown, *including the use of antibiotics such as Lincocin and Cleocin*, as well as from operations, accidents and depleting illnesses."

Though the testimony and evidence is exceedingly more supportive of Mauldin's position than the above admission reveals, it is apparent that such admission illustrates an evidentiary basis for the jury verdict.

Moreover, there is substantial factual and medical

evidence which shows that the defendant's drugs were the cause of Mauldin's pseudomembranous colitis. It is uncontradicted that Mauldin's past medical history was noncontributory in that he had no gastrointestinal problems, accidents or depleting illnesses which defendant suggests may have caused his condition. It is also uncontradicted that a known side effect (but not published by Upjohn at the time) of the use of Cleocin and Lincocin was the development of a condition known as pseudomembranous colitis. It is established that Mauldin developed the symptoms and conditions of pseudomembranous colitis immediately following the use of Upjohn's drugs; the signs and symptoms and conditions which Mauldin had were identical to the signs, symptoms and conditions of one who developed pseudomembranous colitis as the result of taking Cleocin and Lincocin. It was firmly established that Mr. Mauldin did, indeed, have pseudomembranous colitis; and it was established that the onset of such symptoms was entirely consistent with, and identical to, the time frame of the development of pseudomembranous colitis in typical Cleocin-Lincocin cases.

During the course of trial, and while under cross-examination, Dr. Tedesco, admitted that he had conducted tests for Upjohn to study the "cause and effect" relationship between Upjohn's drugs and pseudomembranous colitis. These tests revealed that the drugs Cleocin and Lincocin were causing a substantially "high" incident rate of pseudomembranous colitis in persons who used such drugs.[1] Further testimony revealed that approximately 24% of those taking Cleocin were developing severe diarrhea, yet, in such cases, quick diagnosis and proper treatment (known to Upjohn but not disseminated) reversed the

[1] Dr. McHardy (R.T. Vol. II p. 67).

disease process so that it did not develop into pseudomembranous colitis.

The record establishes that Upjohn's drugs caused Mauldin's condition. A brief reference to the record shows:

> A. Mauldin's initial injury for which he received treatment with Lincoln and Cleocin was simply an injured thumb and was expected to be discharged by his treating physician and return to work within three (3) weeks. (Record, Dr. Walker, Vol. I, p. 74).
>
> B. Mr. Mauldin testified (R.T. Vol. IV, p. 123) he had no prior history or condition of gastrointestional problems; no prior treatment for such GI problems, (p. 124); he began to have bloody bowels and stomach cramps shortly after he had taken Upjohn's drugs (p. 126); thereafter he began to get weak, lose weight, had chills, fever and cramps in his abdomen, and again returned to Dr. Walker's office for treatment, all to no avail, as the diarrhea continued (p. 127); he was now having eight to ten bowel movements per day, continued fever and chills and stomach cramps and was protoscoped as an outpatient, which protoscope examination showed *early ulceration of his colon* (p. 129; - Pl. Ex. #2, p. 20); at the time of Mauldin's admission to the hospital, his diarrhea was so frequent he had lost 20 lbs; he had fever of 103 degrees, chills, stomach cramps, friable and edematous colon (p. 131). There was a depletion of his potassium and serum protein. (R.T. Vol. III, p. 29)
>
> C. The onset of Cleocin-Lincocin caused pseudomembranous colitis is characterized by severe diarrhea, stomach cramps, abdominal pain, fever, chills, depletion of potassium and

serum proteins. (Testimony and Tedesco reports, R.T. Vol. V, p. 46; Pl. Ex. #3, p. 3,4) (R.T.Vol. II, p. 56-57 - Dr. McHardy)

D. Dr. McHardy testified that the above described symptoms and conditions in Mr. Mauldin were the early symptoms of pseudomembranous colitis and that, in his opinion, the disease process of pseudomembranous colitis had started *prior* to plaintiff's admission to the hospital on May 15, 1974. (Record, Vol. II, p. 56).

E. Dr. McHardy testified that in his opinion the drug, Keflex, did not cause Mauldin's pseudomembranous colitis, as it was not given to Mauldin until *after* he was hospitalized with such symptoms already existing. (Record, Vol. II, p. 127)

F. The medical record established that Mauldin received two, and only two antibiotics, namely, Lincocin and Cleocin, prior to his admission to the hospital on May 15, 1974. (Pl. Ex. #2).

G. It was established that Upjohn's drugs caused pseudomembranous colitis; that Mauldin had pseudomembranous colitis (R.T. Vol. III, P. 29-30).

H. Upjohn's own tests and studies proved that "pseudomembranous colitis should now be considered in a differential diagnosis of any patient who develops elevated temperature, ileus or diarrhea while taking Clindomycin (Cleocin), or after having recently completed a course of Clindomycin." (Pl. Ex. #4; R.T. Vol. II-A, p. 51).

I. Upjohn offered no other possible cause of the plaintiff's pseudomembranous colitis, other than the suggestion that Keflex may have caused or contributed to the plaintiff's condition. Not one

doctor testified that Keflex caused or contributed to plaintiff's condition. Dr. McHardy expressly denied such a suggestion.

Actually, the medical director of Upjohn admitted that Cleocin was a cause of pseudomembranous colitis. This admission was made by Dr. Varley in his attempt to support Upjohn's position that the package insert and warning were reasonably adequate to advise treating physicians of the side effects. The position taken by Upjohn was that the words "acute colitis" contained in the package insert were actually meant to alert Mauldin's treating physician of the frequent occurrence of pseudomembranous colitis resulting from the use of its drugs. (R.T. II, p. 262).

The detailed testimony of Dr. Gordon McHardy and Dr. Francis Patton, relate Mauldin's disease to Cleocin and Lincocin (R.T. Vol. II p. 56-57):

"Q. Do you have an opinion, Dr. McHardy, based on everything you have told us, in the records that you have reviewed, what is the condition of Mr. Mauldin which led to the colostomy and the removal of his colon and the other conditions which we have discussed today?

A. I feel he had pseudomembranous colitis.

Q. When, according to the review of the history, do you feel that the disease process started?

A. Chronologically it started in the period between his first hospitalization and his second admission.[2]

[2] Mauldin's first hospitalization was for his injured thumb at which time he received Lincocin and Cleocin; his second admission was for pseudomembranous colitis.

Q. Between the first hospitalization March 31, and his second admission *of May 15*?

A. That is correct.

Q. Why do you say that, Doctor?

A. Because the patient began to have diarrhea approximately 8 to 10 days after he..he had 8 to 10 days prior to the admission to the hospital. He had fever to 103 degrees. he had a significant weight loss recorded at approximately 20 lbs. He was admitted to the hospital with all the indications of severe fulminating illness and that he had a high white count, high neutrohil segment, and white count. He already had a depletion of his potassium and depletion of his serum protein.

Q. The history which you have taken, and a review of the medical records, indicate that Mr. Mauldin was given antibiotic drugs other than Lincocin or Cleocin prior to that second admission?

A. From the record that was the *only* antibiotic medication he received prior to the admission of 5/15."

Dr. Patton testified: (R.T. Vol. III, p. 29-30);

"Q. Based upon your review of these particular reports and the materials which you have examined and the photographs which you have discussed with us today, do you have an opinion as to the disease entity which Mr. Mauldin had?

A. Pseudomembranous colitis.

Q. Is there any doubt in your mind about that?

A. There is no question."

Upjohn contends that no expert testified in words or phrases suitable to it, that Mauldin's condition was caused by its drugs. This contention forces lawyers to engage in a battle of Semantics. That battle is unnecessary as this Court has previously held that the matter "does not turn on the use of a particular form of words." *Sentilles, supra.* The members of the jury "were entitled to take all the *circumstances,* including the medical testimony, into consideration." *Sentilles, supra.*

Here the jury was satisfied, as well as the reviewing Appellate Court, that such supportive facts, testimony and circumstances were sufficient for the jury to reach its verdict. Apparently, even Upjohn was satisfied that the testimony of Dr. McHardy established that Cleocin caused Mauldin's condition. After cross-examination of McHardy by Upjohn's counsel, and on submitting the witness for redirect examination, the following question was asked: (R.T. Vol. p. 129)

> "Q. Dr. McHardy, is (has) anything that you have discussed in your cross-examination with Bill Bush changed the opinion that you have expressed earlier this morning in relationship to the cause of Mauldin's illness between Cleocin and pseudomembraneous colitis?"
>
> MR. BUSH: (Counsel for Upjohn)
>
> "Your Honor." If I might, if we are *going to reiterate his total direct examination,* then certainly, I would like to re-cross him. *I believe that's total reiteration.*"

If Upjohn's counsel, after listening to the testimony of Dr. McHardy felt that the above question put to Dr. McHardy involved "*total reiteration*" of his testimony,

how can they now complain that the jury was not free to reach the same conclusion, namely, that the testimony of Dr. McHardy established that Cleocin caused the pseudomembranous colitis.

Upjohn's argument that in order to sustain a jury verdict, an expert must state categorically or by use of certain words, that a certain effect resulted from a certain cause, is simply incorrect. It is contrary to the decision of this Court in *Sentilles v. Inter-Carribbean Shipping Corp.*, 361 U.S. 107, 109, 110, 80 S.Ct. 173, wherein the Court stated:

> "The jury's power to draw the inference that the aggravation of petitioner's tubercular condition, *evident so shortly after the accident*, was in fact caused by that accident, was not imparied by the failure of any medical witness to testify that it was in fact the cause. Neither can it be impaired... by the fact that other potential causes of the aggravation existed...The matter does not turn on the use of a particular form of words by the physicians in giving their testimony. The members of the jury, not the medical witnesses, were sworn to make a legal determination of the question of causation. They were entitled to take all the circumstances, including the medical testimony into consideration. (Citations omitted). *Though this case involves a medical issue, it is no exception to the admonition that it is not the function of a court to search the record for conflicting circumstantial evidence* in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences. The focal point of judicial review is the reasonableness of the particular inference or conclusion drawn by the jury..."

In the instant case, the medical testimony provides an abundance of substantial *probative facts* which support the jury conclusion. The jury was fully educated and informed on a basis which they could clearly understand. The existing circumstances and facts justify with reason the conclusion of the jury.

What is essential, is, as here, the record contains reasonably persuasive proof and probative facts which support the jury conclusion. Here, the jury verdict did not involve, as suggested by Upjohn, mere speculation unguided by the experts, as the experts' medical testimony provided the necessary probative facts to explain Mauldin's disease and proved its onset and progression to be identical to Cleocin-Lincocin induced pseudomembranous colitis. The detailed medical testimony proved that Upjohn's drugs caused pseudomembranous colitis and that Mauldin developed psuedomembranous colitis immediately following the use of Upjohn's drugs. The medical witnesses testified in great detail as to the medical symptoms and conditions which Mauldin did, in fact have, and showed that these signs and symptoms were identical to Cleocin-Lincocin pseudomembranous colitis. Furthermore, it was shown that Mauldin's disease began at the same point in time in which Upjohn tests verified Cleocin-Lincocin pseudomembranous colitis would begin.

These facts, and the substantial evidence contained in the record, were sufficient to allow the jury to deliberate on a fully informed basis, and to conclude, in the light of such evidence, that Upjohn's drugs did, indeed, cause Mauldin's disease.

In the instant case, petitioner's argument on causation overlooks the evidence contained in the record and

relies solely on its assertion that the medical testimony did not use a "particular form of words." The jury did not have to speculate that Cleocin-Lincocin caused pseudomembranous colitis. That element of causation was established by medical testimony. Nor did the jury have to speculate that Mauldin had pseudomembranous colitis for the medical testimony established that fact also. Nor did the jury have to speculate on the fact that Mauldin's pseudomembranous colitis was caused by Upjohn's drugs because that fact was established by the detailed testimony relating Mauldin's symptoms, onset and progression of his disease, to Cleocin-Lincocin induced pseudomembranous colitis.

Mauldin clearly met his burden of proving causation by a preponderance of the evidence, both direct and circumstantial.

Specific medical testimony to prove causation is not required. In *Fitzgerald v. A. L. Burbank & Co.*, 451 F.2d 670 (2nd Cir. 1971), the court stated at Page 681:

> "As plaintiff claimed at trial, he *did not need specific medical testimony* to prove that the doctor's negligence was the proximate cause of death. The jury decides whether or not there was proximate cause, and they may do so both in the *absence of direct medical testimony on the point* (citing Sentilles, supra)...and, in certain circumstances *even counter* to the only medical testimony on causation." (citations omitted—emphasis added).

To the same effect see *Jenkins v. General Motors Corp.*, 446 F.2d 377 (5th Cir. 1971).

In *Picou v. American Offshore Fleet, Inc.*, 567 F.2d 585 (5th Cir. 1978), also relying on the *Sentilles* case, supra, the appellate court held that the trial court erred in not allowing the issue of causation to go to the jury in the *absence* of medical testimony. The issue was whether or not the "anxiety and stress" allegedly sustained by the injured party led to a second heart attack. On this issue the court stated:

> "Although the trial court decided that in the *absence* of medical testimony it should find that there was no proof that the second heart attack in the month was caused or aggravated by this 'anxiety and stress', we are of the view that Picou was entitled to have the jury pass on this issue."

In *Porter v. American Optical Corp.*, 641 F.2d 1128 (5th Cir. 1981), applying Louisiana Law on this issue, as enunciated in *Weber v. Fidelity and Casualty Company of New York*, 250 So.2d 754 (La. 1971), the *Porter* court stated:

> "We believe that there was substantial evidence from which the jury could conclude that a defective design in the respirator apparatus proximately caused Porter's injury. The plaintiff's burden is to prove causation by a preponderance of the evidence which may be met by direct or circumstantial evidence. The evidence need not negate all other possible causes. (Citing Weber and others) 641 F.2d, p. 1142.

See also: *Reeves v. Great Atlantic & Pacific Tea Company*, 370 So.2d 202 (La. App. 3rd Cir. 1979); Page 208; and *Jordan v. Travelers Insurance Co.*, 245 So.2d 151 (La. 1971); *Naquin v. Marquette Casualty Co.*, 244 La. 569; 153 So.2d 395 (La. 1963).

Furthermore, in reviewing the evidence in any given case, it is clear that the jury is free to consider the entire record and to draw therefrom such inferences as may be reasonable. Such a verdict, once rendered, must be reviewed in the light most favorable to the verdict. As stated by the Supreme Court in *Lavender v. Kurn*, 1946, 327 U.S. 645, 653, 66 S.Ct. 740, 744, 90 L.Ed. 916 (1946):

> "It is no answer to say that the jury verdict involved specualtion and conjecture. Whenever facts are in dispute or the evidence is such that fairminded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference. Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear. But, where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever effects are inconsistent with its conclusion. And the Appellate's Court function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable."

See also: *Thomas v. Conemaugh and Black Lick Railroad Co.*, 234 F.2d 429 (3rd Cir. 1956), and *Schulz v. Pennsylvania Railroad Co.*, 350 U.S. 523, 76 S.Ct. 608 (1956); *Roberton v. Douglas Steamship Co.*, 510 F.2d 829 (5th Cir. 1975), and *Reyes v. Wyeth Laboratories*, 498 F.2d 1264 (5th Cir. 1974).

The instant case correctly applies the rule of law which allows the jury to find causation in light of the medically established probative facts contained in this record.

In Upjohn's brief the above cases are not addressed, rather they rely on *Bearman v. Prudential Ins. Co. of America*, 186 F.2d 662 (10th Cir. 1951). Reliance on the *Bearman* case is not well founded. First, the *Bearman* case was decided prior to the United States Supreme Court decision in *Sentilles, supra*, and second, the *Bearman* court only recognized a rule of the local state requiring the testimony of an expert to prove causation under its own facts. Questions controlled by state law do not present conflicts which justify certiorari. *Ruhlin v. New York Life Ins. Co.*, 304 U.S. 202, 58 S.Ct. 860 (1938). *Bearman* stands alone.

Respondent does not argue that expert testimony is not required to guide a lay jury. That is not the issue here. Here the medical testimony provided substantial explanation of medical causation, supported by detailed facts sufficient to fully inform the jury.

Each of the other cases cited by petitioner in its brief simply are limited to their own facts. In *Franklin v. Shelton*, 250 F.2d 92 (10th Cir. 1957) the Court refused to allow the female plaintiff, who had no medical training, to offer her own testimony relating to the diagnosis of her female disorder and eye problems; in *Curtis v. General Motors Corp.*, 649 F.2d 808 (10th Cir. 1981), the Court was concerned with an "enhancement of injury" under the Crashworthy Doctrine. There the court found the record lacked sufficient probative facts to support the plaintiff's position and that the *only* medical evidence offered was contrary to the plaintiff's position. Such decisions have no application to the instant case. Many cases turn on their own facts. This is precisely one reason for the guidelines established by this Court for refusing to grant writs solely for the purpose of reviewing the sufficiency of evidence.

Upjohn further relies on *Walstad v. University of Minnesota Hospitals*, 442 F.2d 634 (8th Cir. 1971); *Hegger v. Green*, 646 F.2d 22 (2nd Cir. 1981); and *Fitzgerald v. Manning*, 679 F.2d 341 (4th Cir. 1982) cases. They argue that the rule of law described therein requires medical expert testimony when the causal relationship sought to be proved is not within the common knowledge of laymen. First of all, in the *Walstad, Hegger and Fitzgerald (supra)* cases, at issue was the type of medical evidence required, *under local state law*, to establish the standard of conduct in the community in order to prove a medical malpractice case. Secondly, the sufficiency of evidence must be decided on an individual case by case basis. These cases do not control the instant issue and are inapplicable.

Finally, petitioner cites a series of cases arising from the Swine Flu Program which purportedly stand for the proposition that the jury cannot consider, as one of its probative facts, the temporal relationship between the onset of the plaintiff's condition and the ingestion of its drugs. However, such cases have application only where the evidence is based on "nothing more than a temporal relationship."

In the instant case, however, there is more than a mere temporal relationship. The facts and circumstances recited here illustrate a sufficient basis for the jury's decision. The record contains even greater and more detailed evidence supporting the jury verdict.

CONCLUSION

In conclusion, it is respectfully submitted that the record contains sufficient probative facts, direct and circumstantial evidence, to prove that Upjohn's drugs were

the cause of Mauldin's condition. The jury was free to consider the record as a whole and to draw therefrom those reasonable inferences supported by such facts. As *Sentilles* previously held, "Though this case involves a medical issue, it is no exception to the admonition that it is not the function of a court to search the record for conflicting circumstantial evidence." The jury was "entitled to take all the *circumstances*, including the medical testimony into consideration." The Appellate Court reviewed the entire record and concluded that there was a sufficient evidentiary basis for the jury verdict.

Respondent respectfully requests the Petition for Writ of Certiorari be denied.

Respectfully submitted:

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CERTIFICATE

I, Philippi P. St. Pee', certify that I have on the 11 day of August, 1983, sent by first class mail, postage prepaid, three copies of the foregoing brief to Robert K. Wrede, 600 Wilshire Blvd., Los Angeles, California, 90017, attorney for petitioner.

PHILIPPI P. ST. PEE'